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No. 08-1017

Supreme Court, U.S.
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In The Supreme Court of the United States

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS,

Petitioner,

v.

SUSAN AND WILLIAM LAURENDINE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Civil District Court For The Parish Of Orleans, State Of Louisiana

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

IS IT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT DOES NOT ABUSE ITS BROAD DISCRETION WHEN IT DENIES THE DEFENDANTS' MOTION(S) TO RECUSE, WHEN THERE IS NO ACTUAL SHOWING AND FINDING OF BIAS OR PREJUDICE, AND WHEN BOTH THE LOUISIANA SUPREME COURT, AND THE FOURTH CIRCUIT COURT OF APPEAL, HAVE TWICE REVIEWED THE SAME MOTION(S), AND FOUND NO BASIS TO OVERTURN THE TRIAL COURT'S RULINGS?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed below:

Susan Laurendine	Plaintiff
William Laurendine	Plaintiff
Al Lebouef	Plaintiff
Aline Hodges	Plaintiff
Pierre Ascani	Plaintiff
Theresa Harvey	Plaintiff
The Honorable Dale Atkins	Plaintiff
Anita L. Sarrat	Plaintiff
The Board of Commissioners for the Orleans Levee Board	Defendant
Louisiana Department of Transportation and Development	Defendant
Sewerage and Water Board of New Orleans	Defendant
State of Louisiana	Defendant

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OPINIONS BELOW

ACTION OF THE TRIAL COURT

On May 23, 2008, Judge Bagneris issued a Judgment and Reasons for Judgment, just as he did in the prior year in 2007, which both the Fourth Circuit and this Supreme Court of Louisiana upheld. He ruled that he could properly hear the motion to recuse Judge Reese, and that the evidence presented did not show that Judge Reese would be biased, and that the record did not mandate that Judge Reese be recused. (See **applicants' appendix exhibits attached to their application**).

ACTION OF THE FOURTH CIRCUIT COURT OF APPEAL

Once again, on July 28, 2008, the Fourth Circuit expressly found that Judge Bagneris did not abuse his discretion in denying the applicants' motion to recuse Judge Bagneris from hearing the motion to recuse Judge Reese from hearing the above captioned matter. (See **applicants' appendix exhibits attached to their application**).

ACTION OF THE LOUISIANA SUPREME COURT

On November 10, 2008, the Supreme Court of Louisiana denied the defendants' writ applications on their motion to recuse Judge Bagneris from hearing

the motion to recuse Judge Reese. (See **applicants' appendix exhibits attached to their application**).

STATEMENT OF NON-JURISDICTION

There is no basis for this Honorable Court's jurisdiction. There is no valid question as to any treaty or statute of the United States or the State of Louisiana. There is no title, right, privilege or immunity that is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

LACK OF CONSTITUTIONAL PROVISIONS INVOLVED

There is no valid implication of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in this case.

STATEMENT OF THE CASE

On August 29, 2005, hurricane winds in excess of 115 miles per hour struck the Metropolitan New Orleans area, causing wind damage to homes and other structures. After the wind subsided, a storm surge created a 500 foot breach in the 17th Street canal levee and its flood walls collapsed after water

flowed over the 17th Street canal levee and the London Avenue Canal levee. Once the support flood walls were eroded, they broke, sending water pouring into the Lakeview area and flooding downtown New Orleans.

The Board of Commissioners for the Orleans Levee District, Parish of Orleans, was negligent in designing and installing concrete flood walls which were below standard and unstable in a flood, failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane, and failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.

The Board of Commissioners was responsible for providing flood protection for Orleans Parish, and for the efficient operation and maintenance of all of the levee structures and facilities, in addition to continuous inspection and maintenance of the levees and flood walls. In addition, the State's Department of Transportation and Development was responsible for maintaining and inspecting the levees in both Orleans and Jefferson Parishes.

The Sewerage and Water Board of New Orleans was also responsible for inspection and maintenance procedures performed on Orleans Parish levees and dredging of their canals. The State of Louisiana was responsible for financing, overseeing, maintaining and supervising activities of the Board of Commissioners for the Orleans Levee District and the

Department of Transportation and Development, and insuring that the citizens of Orleans and Jefferson Parishes were safe from levee breaks.

Suit was filed herein on September 24, 2005. Defendants removed the case to the United States District Court for the Eastern District of Louisiana, claiming federal officer status. Plaintiffs filed a motion to remand on November 1, 2005. On May 31, 2006, Judge Duval remanded the case back to Civil District Court. On July 10, 2006, the plaintiffs amended their petition to add two additional Louisiana defendants, making only state court allegations against them. Nevertheless, the defendants once again removed the case back to the Eastern District of Louisiana. Shortly thereafter, Judge Duval again remanded the case back to Civil District Court for the same reasons enunciated in his original opinion. Since that time, the plaintiffs filed a motion to set the case for a status conference in order to get the case moving, so that the process of rendering justice could begin.

However, thereafter, defendant Orleans Levee District ("OLD") has filed multiple motions to recuse various judges in Civil District Court. The case has floundered on the various motions to recuse because, despite the fact that the CDC judges feel that they can render a fair and impartial verdict, OLD has challenged the judges' refusal to recuse themselves.

Finally, Judge Bagneris, at the hearing on his motion to recuse, urged the parties to seek writs from

the higher courts following his decision, regardless of how he ruled. The matter was brief and read by Judge Bagneris in advance of the hearing. He appeared at the hearing well prepared, having read the briefs of the parties, and having obviously gathered his own research and having presided over class-action type suits many times prior. The judge took the matter under advisement and rendered an opinion with reasons therefore on April 30, 2007. His judgment and reasons are appended to the defendants' writ application. He properly denied the defendants' motion to recuse him from hearing the motion to recuse Judge Reese. He thoroughly addressed Louisiana Code of Civil Procedure Article 151. He also properly rejected the defendants' reliance upon the judicial canon articles, noting that only the Louisiana Supreme Court has jurisdiction to address alleged violations of the judicial canons. Judge Bagneris found as fact that the defendants-movers failed to make **an actual showing** of bias and prejudice required to warrant the judge's recusal. Therefore, he properly denied the defendants' motion.

On June 25, 2007, the Fourth Circuit Court of Appeal denied the defendants' writ application, since no bias or prejudice was shown, in Fourth Circuit No. 2007-C-0674. On October 12, 2007, the Supreme Court of Louisiana also denied the defendants' writ application based upon the record.

Despite the foregoing rulings by both the Fourth Circuit and the Louisiana Supreme Court, defendants-applicants have again filed the same motion(s)

to recuse Judge Bagneris and Judge Reese for the exact same reasons enunciated in their original motion. The only exception is that they now referenced lawsuits filed by Judge Bagneris and Dorothy Reese, Judge Kern Reese's wife. The other addition is the transcript of the hearing, with Judge Kern Reese answering the questions of both defendants-applicants and the plaintiffs' counsel concerning his potential bias or prejudice, along with Judge Bagneris' statements, May 23, 2008 Judgment, and Reasons for Judgment.

The transcript of the May 21, 2008 hearing reflects that Judge Reese did not have any ownership interest in the property that is the subject of Dorothy Reese's lawsuit. It also reflects that Judge Reese testified under oath that he could and would be fair and impartial in hearing the *Laurendine* case, which is a jury trial. The May 21, 2008 transcript also reflects that Judge Bagneris stated on the record that he too, could be fair and impartial in hearing both the motion to recuse Judge Reese, and even the merits of the *Laurendine* case, but that solely to avoid any appearance of impropriety, he might have recused himself from hearing the merits. He correctly stated that he would not be precluded by law from even hearing the merits of the case, if he chose to do so. He further articulated that there is no legal basis for him to recuse himself to hear the narrow issue before this Honorable Court, namely, whether or not he is mandated by law to recuse Judge Reese from hearing the merits of the case. On May 23, 2008, Judge Bagneris

issued a Judgment and Reasons for Judgment, just as he did the prior year in 2007, which both the Court of Appeal in Fourth Circuit No. 2007-C-0674, and the Supreme Court of Louisiana upheld on October 12, 2007. He ruled that he could properly hear the motion to recuse Judge Reese, and that the evidence presented did not show that Judge Reese would be biased, and that the record did not mandate that Judge Reese be recused. (See **applicants' appendix exhibits attached to their application**).

Once again, on July 28, 2008, the Fourth Circuit expressly found that Judge Bagneris did not abuse his discretion in denying the applicants' motion to recuse Judge Bagneris from hearing the motion to recuse Judge Reese from hearing the above captioned matter. (See **applicants' appendix exhibits attached to their application**).

On November 10, 2008, the Supreme Court of Louisiana denied the defendants' writ applications on their motion to recuse Judge Bagneris from hearing the motion to recuse Judge Reese. (See **applicants' appendix exhibits attached to their application**).

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION WHEN IT DENIED THE APPLICANTS' MOTION TO RECUSE, WHEN THERE WAS NO ACTUAL SHOWING AND FINDING OF BIAS OR PREJUDICE, AND WHEN BOTH THE FOURTH CIRCUIT AND THE LOUISIANA SUPREME COURT HAVE TWICE REVIEWED THIS MATTER, AND THE RECORD FAILS TO SUPPORT A CLAIM UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. NEITHER THE "PENDENCY" OF THE *REESE* AND *BAGNERIS* LAWSUITS, NOR THE "ALLEGATIONS" OF THE *REESE* AND *BAGNERIS* LAWSUITS WARRANT RECUSAL PURSUANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Defendants-applicants' sole basis for claiming this U.S. Supreme Court's jurisdiction in this matter is its claim that the Louisiana Courts' decisions have deprived them of their right to a fair trial and impartial tribunal under the Due Process Clause of the Fourteenth Amendment. Since the Louisiana Courts properly found that the defendants-applicants failed to carry its heavy burden of showing that Judge Bagneris abused his broad discretion in finding that the defendants-applicants failed to show any bias, prejudice, or impartiality, and in applying law directly on point that a judge is *presumed* to be unbiased, unprejudiced, and impartial (LSA-C.C.P. Article 151),

there is no basis for this Honorable Court's jurisdiction in the above captioned matter.

Neither the "pendency" of the *Reese* and *Bagneris* lawsuits, nor the "allegations" of the *Reese* and *Bagneris* lawsuits warrant recusal pursuant to the Due Process Clause of the Fourteenth Amendment, and defendants-applicants has failed to show that the Louisiana Courts abused their broad discretion in so finding. Although presented as two (2) separate arguments/subparagraphs, the defendants-applicants' arguments are one and the same, and respondents herein address the two together because they are one and the same.

In the United States Supreme Court case of *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), this U.S. Supreme Court held that there was no showing of bias or prejudice to the extent necessary to warrant recusal, and confirmed that *it is the trial judge's call as to whether or not he can render a fair and impartial verdict in a case.* (Emphasis added). A judge is **presumed to be impartial**, and parties seeking recusal bear a **substantial** burden of proving otherwise. *In re Larson*, 43 F.3d 410 (8th Cir. 1994); *Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992).

The fact that an opinion held by a judge derives from a source outside the judicial proceedings at issue is NOT a sufficient condition for bias or prejudice recusal. 28 U.S.C. § 455(a); *Liteky, supra.* This U.S. Supreme Court has never held that the mere

appearance of bias, outside of limited contexts, could give rise to a due process violation. U.S. Const. Amend. XIV; 28 U.S.C. § 2254(d)(1); *Railey v. Webb*, 540 F.3d 393 (6th Cir. 2008), *rehearing and rehearing en banc denied* (6th Cir. 2009) (*distinguishing the 1986 Aetna* case relied upon by defendants-applicants herein).

The record neither warrants this high Court's review, nor supports a finding that any of the lower courts abused their discretion in this matter. In absence of evidence of manifest error or any abuse of discretion on the part of the trial court, its judgment should not be disturbed. *Slavich v. Knox*, 750 So.2d 301 (La.App. 4th Cir. 1999); *Stobart v. State, through DOTD*, 617 So.2d 880 (La. 1993); *Ambrose v. New Orleans Police Department*, 639 So.2d 216, 221 (La. 1994); *Lewis v. State, through DOTD*, 654 So.2d 311, 314 (La. 1995); *Reynolds, Nelson, Theriot & Stahl v. Chatelain*, 428 So.2d 829 (La.App. 5th Cir. 1983), *writ denied*, 434 So.2d 1098 (La. 1983).

Article 151 of the Louisiana Code of Civil Procedure, the controlling article herein, requires an actual showing and finding of bias and/or prejudice in order to warrant recusal. In fact, the legal **presumption**, which the mover must overcome with proof, not speculation or mere allegation, is that a Judge is **presumed** to be **impartial**. *Couvillion v. Couvillion*, 769 So.2d 747 (La.App. 5th Cir. 2000), *rehearing denied, id., writ denied*, 781 So.2d 562 (La. 2001). There must be a statutory ground for recusing a judge. *Chauvin v. Sisters of Mercy Health System, St.*

Louis, Inc., 818 So.2d 833 (La.App. 4th Cir. 2002), *writ denied*, 825 So.2d 1194 (La. 2002). The statutory grounds for recusal of a judge are exclusive, NOT illustrative. *Chavin, id.*; *Guidry v. First Nat. Bank of Commerce*, 755 So.2d 1033 (La.App. 4th Cir. 2000), *writ denied*, 762 So.2d 1106 (La. 2000).

Since article 151 requires a **finding** of actual bias or prejudice, even the "substantial" appearance of the possibility of bias, or the mere appearance of impropriety are NOT causes for removing a judge from presiding in a case. *Edwards v. Daugherty*, 729 So.2d 1112 (La.App. 3rd Cir. 1999), *rehearing denied, writ denied*, 747 So.2d 1105 (La. 1999). (Emphasis added).

There must be an actual **showing** that the trial judge is biased and/or of some other **alleged** impropriety in order for article 151 to come into play. *Ainsworth v. Ainsworth*, 860 So.2d 104 (La.App. 4th Cir. 2003), *writ denied*, 862 So.2d 995 (2004), *cert. denied*, 124 S.Ct. 2020 (2004). Even things like a judge's son-in-law's inheritance of stock in a corporate party to a lawsuit over which the judge is presiding, without more, does not necessitate a judge's recusal. *Guidry, supra.*

Even a judge's prior relationship with a party's key witness in a case over which the judge presides does not warrant recusal. *Maddox v. City of Oakdale*, 746 So.2d 764 (La.App. 3rd Cir. 1999), *writ denied*, 754 So.2d 936 (La. 2000). A mere appearance of impropriety, not statutorily listed in the exclusive

factors of article 151, "**CANNOT**" be a basis for removal. *Chavin, supra, Alonzo v. State*, 2004 WL 21223147 (La.App. 4th Cir. 2004). (Emphasis added).

A judge presiding over a recusal hearing does NOT abuse his discretion in denying a motion to recuse, even where the trial judge once practiced law with the owner of the non-moving party, had represented the owner on several matters within the prior decade, had accepted a gift from the owner, and saw the owner at social functions on a regular basis, absent **evidence** that he was biased in favor of the owner, or was prejudiced against the other party to the litigation! *Southern Casing of Louisiana, Inc. v. Houma Avionics, Inc.*, 809 So.2d 1040 (La.App. 1st Cir. 2001). (Emphasis added). Bias, prejudice, or personal interest to warrant recusal must be of a **substantial** nature, **AND** based on more than conclusory allegations. *Augman v. City of Morgan City*, 864 So.2d 248 (La.App. 3rd Cir. 2003), *rehearing denied*, 864 So.2d 248 (La.App. 3rd Cir. 2003), *and all cases cited above.* (Emphasis added).

Quite simply, defendants-applicants presented the Court with NO EVIDENCE of the bias of the Honorable MICHAEL BAGNERIS, the Honorable KERN REESE, or of any other Judge sitting in the Civil District Court of Orleans. There is no evidence, no proof, no "finding" of bias or prejudice, that would even arguably apply. Mere allegations are simply insufficient, pursuant to this U.S. Supreme Court, the Supreme Court of Louisiana, and all Louisiana Appellate Court law. The applicants are simply asking the

Court to make **presumptions**, which are in direct contravention to the only applicable **presumption** in article 151, which is that the trial judge is **presumed** to be impartial! *Couvillion, supra.* Therefore, the defendants' motion to recuse was properly denied.

Neither Judge Bagneris nor Judge Reese will be a witness in the above captioned matter. Even if defendants-applicants would present some EVIDENCE OR PROOF of his personal advantage, it would be for the trial judge, in the first instance, to state whether or not he would be influenced by the alleged personal advantage. Defendants-applicants are inaccurate when they suggest that a judge's alleged impartiality may be "questioned" by mere suggestion or speculation. A judge's impartiality may only be "questioned" by evidence. (*See all cases cited above*).

The cases cited by defendants-applicants are either factually distinguishable and inapplicable and/or actually rule in the plaintiffs-respondents' favor herein. For instance, in *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), the clear basis for the court's decision was the fact that the Board of Optometrists that were ruling upon other optometrists' conduct, WERE THEIR COMPETITORS IN THE INDUSTRY. The members of the Board were seeking to put their direct competitors out of business. Shepardization of the *Gibson* case reflects that it is to be used only with extreme caution. It has been distinguished more than thirty (30) times to date.

There are even other optometry board cases, which distinguish and refuse to apply *Gibson*, which is an optometry board case. For instance, in *Massengale v. Oklahoma Board of Examiners in Optometry*, 30 F.3d 1325 (10th Cir. 1994), the United States Tenth Circuit Court of Appeals directly addressed *Gibson* and found it inapplicable. In *Massengale*, the plaintiffs alleged that they could not receive an impartial hearing because the particular set of Board members that were hearing their case had demonstrably prejudged the issues and possessed an economic stake in the proceedings. *Id.*, at 1329. As evidence on the pre-judgment question, one Board member (Peck) voluntarily recused himself despite the fact that a quorum of his follow Board members had previously refused to disqualify him for bias. The Tenth Circuit found that the plaintiffs produced no "tangible evidence that they will be the victims of an unfair and impartial hearing." *Id.*, at 1329.

The plaintiffs in *Massengale* argued that their case was governed by *Gibson*. However, the particular facts of *Gibson* made it inapplicable, according to the Tenth Circuit. In particular, the optometrists in *Gibson* were without viable **options** to remedy a potentially biased process. The Alabama law in *Gibson* had **no procedures** for challenging the bias of board members. Since Oklahoma law provided **procedures** for challenging the alleged bias, *Gibson* did not apply. The Tenth Circuit also noted in *Massengale*, that the Alabama optometry board in *Gibson* effectively precluded nearly half of the licensed

optometrists in the state **from even participating in** the regulation of their own profession. *Massengale* at 1330. (Emphasis added).

Similarly, the defendants-applicants herein, produced no "tangible evidence that they will be the victims of an unfair and impartial hearing." Also, since Louisiana law provided **procedures** for challenging the alleged bias, *Gibson* does not apply herein. Finally, since neither Judge Bagneris nor Judge Reese are direct competitors with the Orleans Levee District, *Gibson* does not apply herein.

In the **United States Supreme Court** case of *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), the U.S. Supreme Court held that there was no showing of bias or prejudice to the extent necessary to warrant recusal, and confirmed that it is the trial judge's call as to whether or not he can render a fair and impartial verdict in a case.

The *Aetna Life Ins. Co.*[1] case relied upon by defendants-applicants is also importantly distinguished from the instant suit in that the Justice in *Aetna* who was to hear that case and vote on the ruling of the actual merits of the case, not merely whether another Justice could be fair and impartial, had himself, a pending lawsuit related to or affected by his own ruling ON THE MERITS! In contrast, Judge Reese neither has nor will he have a pending lawsuit of his own. Evidence submitted and the May 21, 2008

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[1] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986).

hearing shows that Judge Reese had and has a separate property agreement with his wife, and that she is the sole owner of the family home. Furthermore, she and her children may opt out of any proposed class action lawsuit, which has not yet even been attempted to be certified.

The *Disaster Restoration*[2] case relied upon by defendants-applicants in the lower courts is also inapplicable. In that case, Judge Liljeberg expressly stated that the enrollment of a certain attorney into the case would require his recusal from the case. It was Judge Liljeberg himself who definitely stated that his recusal would be required. The sole issue before the appellate courts was whether or not the attorney would be allowed to enroll, understanding that it would, based upon the Judge's own suggestion, warrant recusal. The case would only be applicable herein if Judge Bagneris or Judge Reese were to state that the enrollment of a certain attorney into this case would require his recusal. That is not the issue before this Honorable Court and the Louisiana courts. Therefore, *Disaster Restoration* is inapplicable.

The *In re Cooks*[3] case has been distinguished much more recently by the Fourth Circuit's decision in *Guidry v. First NBC, supra.* Furthermore, con trary to the defendants-applicants' suggestion, *In re Cooks* does NOT turn the "MAY" recuse language of

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[2] *Disaster Restoration Drycleaning, L.L.C. v. Pellerin Laundry Machinery Sales Co., Inc.*, 927 So.2d 1094 (La. 2006).

[3] *In re Cooks*, 694 So.2d 892 (La. 1997).

LSA-C.C.P. article 151(4) to "SHALL" recuse. There would still have to be a hearing with the trial judge testifying as to his bias and/or impartiality. In addition, neither Judge Bagneris, Judge Reese, nor any member of their families are parties to the instant suit. Therefore, even in theory, *In re Cooks* is inapplicable herein. Even if they were, Judge Bagneris or Judge Reese could possibly avoid recusal by merely disclosing the relationship, and presenting testimony to the judge presiding over the recusal hearing, as to whether or not he could render a fair and impartial verdict. In fact, Judge Reese has now done so in this case. He has not filed suit. He and his wife have no community property. The family home in question is the sole property of Dorothy Reese.

Judge Reese affirmatively testified, as Judge Stanwood Duval did in *Berthelot v. Boh Brothers Const. Co., LLC*, 431 F.Supp.2d 639 (E.D.La. 2006), that he could and would do what was right under the law, rather than simply pass the buck. Everyone in Louisiana knows someone who was adversely affected by Hurricane Katrina. There can be no presumption that a sitting Judge, who is under a duty to uphold the law, will be biased or prejudiced. The law is that there is a presumption that he or she will NOT be biased or prejudiced. The record reflects no showing to the contrary, and this Honorable Court must reach its decisions based upon the record, not upon suggestion, speculation, presumptions, or mere possibilities. The problem in *In re Cooks* was that the judge failed to **disclose** the relationship. In any event, defendants' motion on this alleged basis is speculative, at best.

The *Republic of Panama*[4] case cited by defendants-applicants to the Louisiana courts has also been subsequently distinguished as inapplicable by the U.S. Fifth Circuit's decision in *Patterson v. Mobil Oil Corporation*, 335 F.3d 476 (5th Cir. 2003). First, the *Republic of Panama* case is easily distinguishable from the present suit even without the U.S. Fifth Circuit's subsequent decision in *Patterson, supra.* In *Republic of Panama*, the defendants were tobacco companies which moved to recuse Judge Carl Barbier. The suit was against the tobacco companies for the addictiveness and health risks of tobacco. Before his appointment to the federal bench, Judge Barbier was the president of the Louisiana Trial Lawyer's Association. During the time that Judge Barbier was president of the LTLA, the LTLA submitted an amicus brief on behalf of plaintiffs in a products liability suit against tobacco companies. The LTLA brief alleged that smoking was addictive and caused cancer. The LTLA brief also stated that the tobacco companies have known of the dangers of smoking for decades. Judge Barbier was listed on the brief as LTLA president. *Republic of Panama*, 217 F.3d at 344-45.

It is easy to see how the Fifth Circuit in *Republic of Panama* agreed that Judge Barbier should be recused. No such facts exist in this case. Neither Judge Bagneris nor Judge Reese have expressed opinions or written briefs on the issues before the Court in the *Laurendine* matter, nor have either of

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[4] *Republic of Panama v. American Tobacco Co.*, 1999 WL 350030 (E.D.La. 1999), *vacated and remanded*, 217 F.3d 343 (5th Cir. 2000).

their names been included in any of the pleadings by any party herein or hereto. *Republic of Panama* is completely distinguishable and not applicable herein.

Similarly, the *Nicols*[5] case is clearly distinguishable and inapplicable. In *Nicols*, the defendant in the Oklahoma City federal building bombing, the trial judge's own building was blown up, killing and injuring people in that judge's courtroom at the time of the bombing. It would be hard to imagine anyone not being emotionally involved in that case. Although the flooding of a judge's home, which has not been shown by defendants-applicants, could arguably be an influence, it is hardly the same as having had his courtroom blown up with people injured and killed right before his eyes.

Furthermore, the United States District Court for the Eastern District of Louisiana, in the lead federal case arising from Hurricane Katrina, *Berthelot v. Boh Brothers Construction Co., LLC*, 431 F.Supp.2d 639 (E.D.La. 2006), expressly addressed *Nicols* and declined to find it applicable to the federal Hurricane Katrina cases! In *Berthelot, id.*, the Honorable Stanwood Duval, who works and resides in New Orleans, denied the defendants' motion to recuse him. Judge Duval expressly addressed 28 U.S.C. 455 and the *Nicols* case. He began by citing language from both *Nicols*, the **Fifth Circuit's** subsequent decision in *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997); and *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993).

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[5] *Nichols v. Alley*, 71 F.3d 34 (10th Cir. 1995).

Those decisions state that 28 U.S.C. § 455 "**must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.**" He further cited *Cooley, id.,* at 993, stating that, " . . . **a judge has a strong duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.**" (*Also citing, Greenspan*, 26 F.3d 1005; *In re American Ready Mix, Inc.*, 14 F.3d 1501; and *Hinman*, 831 F.2d at 939).

The *Tramonte*[6] case relied upon by defendants-applicants to the Louisiana courts does NOT hold that Judge Lemmon had to recuse herself. It merely held that the record was "**insufficient**" for the Fifth Circuit to determine whether or not Judge Lemmon should have recused herself. *Tramonte*, at 1029. And as to the Judge's office staff, the very case relied upon by defendants, *Tramonte,* clearly holds that even family members, if more distantly related that one's spouse or *minor* children *residing in his household*, would NOT require recusal! *Tramonte*, at 136 F.3d 1031. (Emphasis added). That would mean that even Judge Bagneris' or Judge Reese's children, who do not live with them, would not mandate his recusal. It also means that no member of his staff having an interest in the case(s), would mandate recusal either.

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[6] *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998).

In fact, Judge Duval distinguished *Tramonte* and held that his (Judge Duval's) own daughter would at best be a member of a **putative class** and members of a **putative** class are NOT "parties" to a class action for purposes of recusal. *Berthelot, supra*, at 648. (Emphasis added). Judge Duval further noted that, a remote, contingent, or **speculative** interest is not a disqualifying financial interest under the statute. *Id.,* at 648; *citing In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir. 1986). Judge Duval also cited *In re Mason*, 916 F.2d 384, 385-86 (7th Cir. 1990), and *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995), for the proposition that, "A thoughtful observer understands that putting disqualification in the hands of a party, **whose real interest may be that the judge will apply rather than disregard the law**, could introduce a bias into adjudication. Thus, the search is for a risk substantially out of the ordinary." *Berthelot, supra*, at 645. (Emphasis added).

Finally, Judge Duval noted in *Berthelot* that, "**If fear of harm caused by flooding and living in a city that has been harmed by flooding is a sufficient reason to mandate recusal, one could argue that living in a city that is inundated by crime, as was and is New Orleans, would require the recusal of judges who live here from hearing criminal matters because they would have a heightened interest in incarcerating all alleged criminals regardless of the facts. Such a position is based on the erroneous presumption that a judge would elevate his or her allegiance**

to a place of residence over one's sworn constitutional oath to adjudicate fairly and equitably based solely on the facts and the law." *Supra*, at 647. (Emphasis added).

Much more recently than the *Tramonte* decision, is the case entitled, *In re Initial Public Offering Securities Litigation*, 174 F.Supp.2d 70 (S.D.N.Y. 2001). The *IPOS* case was over the manipulation of stock prices. Thirty-eight defendant underwriters moved for the Court's disqualification, on the grounds that the trial judge, and her son, owned stocks in certain defendant companies involved in the suit. In rendering its opinion, the *IPOS* court first held that pursuant to 28 U.S.C. § 455, a judge is as much obliged not to recuse herself when it is not called for, as she is obliged to recuse herself when it is called for. The *IPOS* court held that disqualification was NOT warranted when the possible effect of the subject actions on other interests owned by the judge was "remote, contingent, and speculative."

Most importantly, the *IPOS* court, interpreting 28 U.S.C. § 455, expressly held that said statute governing disqualification of federal judges, **allowed a judge to waive putative class membership**. That means that, contrary to the defendants-applicants' assertion, Judge Bagneris, Judge Reese, their friends and relatives, staff members, etc., CAN "opt out." In making its rulings, the *IPOS* court cited the *Tramonte* decision relied upon by defendants-movers, rendered three (3) years earlier.

In *IPOS*, *supra*, the district judge even made comments showing her sadness and regret over her

past stock transactions. Yet the Court found that disqualification was not warranted in that the comments were those of any normal investor who lost money, and did not display a deep-seated favoritism or antagonism as would make fair judgment impossible. In comparison, neither Judge Bagneris nor Judge Reese have made any such comments in this case. In fact, they have both affirmatively stated that they could and would be fair and impartial.

In addition, Judge Bagneris will never be involved with the merits of the case. His narrow issue is whether the law mandates Judge Reese's recusal. Furthermore, there is NO TYPE OF EVIDENCE AT ALL that Judge Bagneris would somehow benefit by Judge Reese presiding over this jury trial, as opposed to any other judge who might preside over the case.

Similarly, in *Key Pharmaceuticals, Inc. v. Mylan Laboratories, Inc.*, 24 F.Supp. 480 (W.D.Penn. 1998), the trial judge held stock in a parent corporation of the plaintiff in a patent infringement case. The Court denied recusal. The Court cited 28 U.S.C. § 455(f), which provides an exception to recusal.

A trial judge is not required to recuse himself when a reasonable person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned. The determination of whether the judge's alleged bias and partiality requires recusal, in the first instance, rests within the sound discretion of the trial judge. To warrant recusal, bias or prejudice must be directed against a party. Even bias exhibited against a party's attorney would

only merit recusal when it results in a material and identifiable harm to that party's case. *Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 949, 117 S.Ct. 360, 136 L.Ed.2d 251 (1996).

The speculative nature of the defendants' motion falls far from those required for recusal. There is no reason to believe that whatever the outcome of this case, that Judge Bagneris or Judge Reese's suggested but improbable financial interest in the case would be a factor, much less a "substantial" factor. Therefore, their recusals are unwarranted, even pursuant to 28 U.S.C. § 455. *Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 949, 117 S.Ct. 360, 136 L.Ed.2d 251 (1996).

It certainly cannot be legitimately said that Judge Bagneris abused his discretion in denying the defendants' motion to recuse. There is no evidence of any "substantial pecuniary interest" that will enure to Judge Reese's benefit, or to Judge Bagneris in not finding that Judge Reese's recusal is mandated. It cannot be said that Judge Bagneris "pre-judged" the facts with respect to whether or not Judge Reese can render a fair and impartial verdict, based upon the evidence presented to the Court concerning Judge Reese. Contrary to the applicants' suggestion, Judge Bagneris has had nothing to do with the "selection" of Judge Reese. The case has come to Judge Reese pursuant to random allotment. Applicants provided no evidence to the Court that there is some special relationship between Judges Bagneris and Reese that would permit a presumption that Judge Bagneris

would benefit by Judge Reese hearing the case. Applicants had every opportunity to present such evidence to the Court at the May 21, 2008 hearing.

CONCLUSION

Defendants-applicants have failed to carry their "SUBSTANTIAL" burden of showing impartiality on the part of either Judge Reese or Judge Bagneris, as all of the Louisiana Courts properly found. The applicants have not made the requisite showing of irreparable harm herein to justify this Honorable Court's exercise of its supervisory review herein. Absent such a showing of irreparable harm, this Honorable Court must deny the defendants' writ application. In fact, based on the Louisiana Supreme Court's review in 2007, the matter is *res judicata.*

In any event, once again, the trial court did not abuse its wide discretion, and defendants-applicants have failed to show such. The trial court properly found that there was NO showing of action bias or prejudice, which is necessary to warrant recusal. Judge Bagneris evaluated all of the pertinent facts including his own situation. He considered the applicable law. The applicable law simply does not mandate recusal. Judge Reese took the stand and testified. He provided the trial court with evidence that he could and would be fair and impartial. That is the actual evidence. Judge Bagneris was not wrong in merely deciding the narrow issue of whether Judge

Reese can be fair and impartial pursuant to LSA-C.C.P. Article 151.

For all of the foregoing reasons, plaintiffs, SUSAN LAURENDINE, ET AL., respectfully urge this Honorable Court to deny the defendants' writ application, and affirm the Louisiana Supreme Court, Fourth Circuit Court of Appeal, and the trial court's judgments, with prejudice, and at defendants-applicants' costs.

Respectfully submitted,

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